

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
Assigned on Briefs July 12, 2007

**IN RE: O.K.D.**

**Appeal from the Juvenile Court for Franklin County  
No. JO3840     Thomas C. Faris, Judge**

---

**No. M2007-00398-COA-R3-PT - Filed October 25, 2007**

---

The juvenile court terminated Father's parental rights based on (1) abandonment by lack of visitation or, at best, token visitation; (2) persistence of unremedied conditions; and (3) substantial noncompliance with the permanency plan. The court further found that termination of Father's parental rights was in the child's best interest. Father appeals. Finding no error below, we affirm the judgment of the juvenile court in all respects.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed**

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., J., joined. WILLIAM B. CAIN, P.J., M.S., not participating.

David Lawrence Stewart, Winchester, Tennessee, for the appellant, O.F.H.

Robert E. Cooper, Jr., Attorney General and Reporter; Douglas Earl Dimond, Sr. Counsel, for the appellee, State of Tennessee, Department of Children's Services.

**OPINION**

On July 7, 2003, the mother of O.K.D. ("Mother") contacted the Department of Children's Services (DCS) and requested that her three sons be taken into DCS custody. At the time of her request, O.K.D.'s father, O.F.H. ("Father"), was incarcerated and the paternity of O.K.D. had not been legally established.<sup>1</sup> On July 8, 2003, O.K.D. and his brothers were placed into the protective

---

<sup>1</sup>Father filed an affidavit from prison, dated July 9, 2003, claiming paternity of O.K.D. The appellate record contains no Order issued from the trial court on this matter. We can assume however, based upon the trial court proceedings, that the court did find Father was the father of O.K.D. At the January 12, 2007 termination proceedings, former DCS case manager Gary Gregory testified that "[i]n September of, I think, '03 shortly after the children came into custody [Father] legitimated himself." And later, the trial court accepted such testimony by stating "I have affirmative testimony from Mr. Gregory, [that] the defendant admitted he is the father of this child. And in the absence of some strong countervailing proof I think that testimony is in the record." The paternity of O.K.D. is not contested and the proceedings below indicate that Father is indeed his birth father.

custody of the State and eventually placed with their maternal aunt in Nashville, Tennessee. Mother surrendered her parental rights to all three children on January 10, 2005.<sup>2</sup>

When Father was released from prison in 2003, DCS case manager Gary Gregory, informed Father that O.K.D. was in state custody. At that time, Father was residing with his girlfriend's mother in Decherd, Tennessee.<sup>3</sup> According to Mr. Gregory, Father failed to maintain contact with him, and the only means by which he could reach Father was either by calling the cell phone of the girlfriend's mother or by stopping by the residence in Decherd. On July 28, 2003, DCS prepared an initial permanency plan.

The goal of the initial permanency plan was to reunify O.K.D. with Father. The plan required that Father contact DCS to arrange for visits with O.K.D., call DCS every other week with updates on the progress of the visits, and arrange his own transportation to the visits. Father was also required to build a relationship with O.K.D. by twice-weekly phone calls, monthly letters and cards, and at least four hours of face-to-face visits monthly. The other permanency plan tasks assigned to Father included: providing an adequate home for O.K.D., contributing 21% of his income to support O.K.D., and providing DCS proof of legal income. Father refused to sign the permanency plan.

On June 19, 2005, DCS sent a certified letter to Father informing him of a foster care review board meeting scheduled in June 2005. Father attended the meeting and visited with O.K.D. during that time for approximately thirty minutes. This was the last known visit Father had with O.K.D.

On June 14, 2006, DCS filed a petition to terminate Father's parental rights. Thereafter, on August 2, 2006, Father filed a motion for visitation with the court, although there is no evidence in the record indicating that Father was ever denied visitation. The court denied the motion for visitation on September 25, 2006, after Father had twice failed to appear at the scheduled hearings. To ensure due process, a notice of publication was placed in the Winchester Herald Chronicle for four consecutive weeks beginning in October 2006 informing Father of the hearing date regarding the termination of his parental rights. On November 16, 2006, the juvenile court approved a revised permanency plan with the new goal of adoption.

The hearing to determine whether Father's parental rights should be terminated was held on January 12, 2007. Again, Father was not present at this hearing. As to Father's notice of the hearing, the trial court made specific findings that proper notice was given to Father and that Father had both actual as well as legal notice of the proceedings. Specifically, the court found "that [Father] was aware of the hearing and had no intention to contest the [termination] matter."

Mr. Gregory testified at the hearing that he had been O.K.D.'s case worker from July 2003 until May 2006. During that time, Mr. Gregory was only aware of two visits between Father and

---

<sup>2</sup> The parental rights relating to O.K.D.'s brothers are not at issue in this appeal, and Mother's rights to O.K.D. are also not at issue herein.

<sup>3</sup> Decherd, Tennessee is located approximately sixty miles from Nashville, Tennessee.

O.K.D. Mr. Gregory testified that Father was without transportation and therefore dependent upon others for rides to Nashville. Father had once asked Mr. Gregory in 2005 if he could accompany him to Nashville to visit O.K.D., but Mr. Gregory refused in order to protect the confidentiality of his other cases. Mr. Gregory testified that Father had never provided proof of stable employment nor verification of his disability income. According to Mr. Gregory, Father admitted at a meeting in March 2006 that “there was no way that he could raise a child” and that he helped Father fill-out pre-surrender agreements. However, at the last minute, Father changed his mind and requested counsel and advice regarding his options.

DCS worker, Eric Smith, who took over the case after Mr. Gregory left DCS, testified that he was unable to reach Father despite calling all previously known numbers. He did not recall any visitation between Father and O.K.D. since he had taken the case.

O.K.D.’s maternal aunt and foster parent also testified. She recalled that in the three years that she had cared for O.K.D., Father had spoken on the phone with O.K.D. only six times and had seen O.K.D. only three times. The visits occurred once when Father visited Nashville, again when the aunt took O.K.D. to Father’s girlfriend’s sister’s house, and finally at the foster care review board meeting. According to the aunt, Father made trips to Nashville, but chose not to see O.K.D. when he was in town because he did not want to ask for a visit or he did not have the time. Father has never given the aunt any support for O.K.D., despite promises to the contrary. The last time the aunt spoke with Father, he was living in a half-way house in Nashville where he was receiving treatment and working as a counselor.

Based on the aforementioned evidence, the juvenile court terminated Father’s parental rights on February 5, 2007, on the grounds of (1) abandonment by lack of visitation or, at best, token visitation; (2) persistence of unremedied conditions; and (3) substantial noncompliance with the permanency plan. The court found that this was not a close case and further found that termination of Father’s parental rights was in O.K.D.’s best interest. Father appeals.

## **I. TERMINATION OF PARENTAL RIGHTS**

Parents have a fundamental right to the care, custody, and control of their children. *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212-13, 31 L.Ed.2d 551 (U.S.1972). However, this right is not absolute and parental rights may be terminated if there is clear and convincing evidence justifying termination under the applicable statute. *Santosky v. Kramer*, 455 U.S. 745, 769, 102 S.Ct. 1388, 1403, 71 L.Ed.2d 599 (U.S.1982). In order to terminate the fundamental right of parenting a child in Tennessee, the party seeking termination must prove by clear and convincing evidence that grounds for termination have been established and that termination is in the best interest of the child. Tenn.Code Ann. § 36-1-113(c). Clear and convincing evidence eliminates any serious or substantial doubt concerning the correctness of the conclusions to be drawn from the evidence, *In re Valentine*, 79 S.W.3d 539, 546 (Tenn.2002), and produces in the fact-finder’s mind a firm belief or conviction with regard to the truth of the allegations sought to be established. *O’Daniel v. Messier*, 905 S.W.2d 182, 188 (Tenn. Ct. App.1995).

## **II. GROUNDS**

The first basis for the juvenile court's termination of Father's parental rights was a finding of abandonment by lack of visitation or, at best, token visitation. Tennessee Code Annotated § 36-1-102(1)(A)(i) defines abandonment as:

(i) For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s) or guardian(s) of the child who is the subject of the petition for termination of parental rights or adoption, that the parent(s) or guardian(s) either have willfully failed to visit or have willfully failed to support or have willfully failed to make reasonable payments toward the support of the child;

In this case, O.K.D. has been in the care of his maternal aunt for three years. In that time, Father visited O.K.D. a total of three times. It is well established that visitation must not be merely "token visitation" which is defined as "visitation, under the circumstances of the individual case, constitutes nothing more than perfunctory visitation or visitation of such an infrequent nature or of such short duration as to merely establish minimal or insubstantial contact with the child." Tenn. Code Ann. § 36-1-102(1)(c). However, Father complains that his failure to visit O.K.D. was not willful because he did not have access to a vehicle in order to accomplish visitation and that such responsibility rested with DCS.

The "willfully" element of the statutory definition has been described as follows:

In the statutes governing the termination of parental rights, "willfulness" does not require the same standard of culpability as is required by the penal code. *G.T. v. Adoption of A.E.T.*, 725 So.2d 404, 409 (Fla. Dist. Ct. App.1999). Nor does it require malevolence or ill will. *In re Adoption of a Minor*, 343 Mass. 292, 178 N.E.2d 264, 267 (1961). Willful conduct consists of acts or failures to act that are intentional or voluntary rather than accidental or inadvertent. *In re Mazzeo*, 131 F.3d 295, 299 (2d Cir.1997); *United States v. Phillips*, 19 F.3d 1565, 1576 (11th Cir.1994); *In re Adoption of Earhart*, 117 Ohio App. 73, 190 N.E.2d 468, 470 (1961); *Meyer v. Skyline Mobile Homes*, 99 Idaho 754, 589 P.2d 89, 97 (1979). Conduct is "willful" if it is the product of free will rather than coercion. Thus, a person acts "willfully" if he or she is a free agent, knows what he or she is doing, and intends to do what he or she is doing.

*In re Audrey S.*, 182 S.W.3d 838, 863-64 (Tenn. Ct. App. 2005).

Pursuant to Tenn. Code Ann. § 37-1-166, DCS is required to make reasonable efforts to prevent the removal of a child from his or her home and to reunify the child with the family in most circumstances. However, "reunification of a family is a two-way street, and the law does not require DCS to carry the entire burden of this goal." *Dep't of Children's Servs. v. Stinson*, No. W2006-00749-COA-R3-PT, 2006 WL 3054604, at \*15 (Tenn.Ct.App. Oct. 30, 2006).

The testimony showed that Mr. Gregory encountered constant difficulties in locating and communicating with Father. Furthermore, despite DCS's efforts, Father failed to maintain contact with DCS and consistently displayed indifference toward establishing a relationship with O.K.D. The child's aunt testified that Father had access to Nashville through rides with friends and that he frequently took such trips, but chose not to visit O.K.D. during those trips because "he didn't want to ask for visitation" or "he didn't have the time." Likewise, in the three years that the aunt has cared for O.K.D., Father only called O.K.D. six times. The aunt testified that Father had access to his girlfriend's telephone which he used to communicate with Mother. However, he did not use the phone to keep in touch with O.K.D. Father also failed to appear twice before the court for hearings on a motion for visitation which was filed by Father's attorney. The aunt recalled that when she spoke to Father about the hearings, he stated, "let them do what they are going to do because [I] am not coming." It was during this conversation that the aunt learned Father was actually living in Nashville (at the halfway house) and had made no attempt to visit his child. The record clearly supports the trial court's findings that Father intentionally and voluntarily chose not to visit O.K.D. and that such conduct constituted abandonment.

We find unpersuasive Father's reliance on *In re M.J.M., Jr.*, No. M2004-02377-COA-R3-PT, 2005 WL 873302 (Tenn.Ct.App. Apr. 14, 2005). In that case, the court refused to terminate the parental rights of mother who was recovering from a drug addition, due to the failure of DCS to make reasonable efforts in assisting in visitation since mother had no means of traveling 20 miles to visit the children. *In re M.J.M., Jr.*, 2005 WL 873302, at \*1. Unlike the mother in the aforementioned case, Father did have access to transportation to accomplish visitation but Father chose not to exercise such visitation, even when visiting Nashville. Furthermore, the mother in *In re M.J.M., Jr.* made significant efforts to comply with the other requirements of the permanency plan including obtaining housing, securing employment, and attending counseling. *In re M.J.M., Jr.*, 2005 WL 873302, at \*9. Conversely, Father has failed to comply with any of the permanency plan tasks, and he has demonstrated no desire to maintain a relationship with O.K.D. His failure to maintain contact through telephone calls cannot be excused by lack of transportation.

As to Father's substantial noncompliance with the permanency plan, the court specifically found that Father did not live up to the goals of the permanency plan: he did not have a stable residence for any length of time and did not exercise reasonable visitation with O.K.D. over the course of more than three years. The court found that "there were 6 telephone calls by [Father] and 3 visits in 3 years . . . [and] there were no Christmas, nor birthday presents from [Father] to the child."

We believe the juvenile court succinctly summarized the situation when it found "that [Father] was given every chance to establish a parent/child relationship . . . [and] that he did not step up to the plate to do so." Accordingly, we affirm the trial court's holding that the grounds of abandonment and substantial noncompliance with the permanency plan were proved by clear and convincing evidence.

### **III. BEST INTERESTS**

In order to terminate parental rights, a court must also determine that there is clear and convincing evidence that the termination is in the child's best interests. Tenn. Code Ann. § 36-1-113(c)(1)(2). The court should consider the following non-exhaustive list of factors in determining whether termination is in a child's best interests:

- (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
- (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
- (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
- (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
- (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
- (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;
- (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;
- (8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or
- (9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5- 101.

Tenn. Code Ann. § 36-1-113(I).

Based on the statutory factors, we agree with the juvenile court's determination that the termination of Father's parental rights was in O.K.D.'s best interests. First, Father failed to present any evidence of stable housing, legal income, or financial support for O.K.D. that could lead to reunification. Likewise, over the past three years Father has not exercised regular visitation with O.K.D. or maintained any regular contact with him and, therefore, has failed to establish a meaningful relationship with O.K.D. Accordingly, we affirm the juvenile court's holding that termination of Father's parental rights was in O.K.D.'s best interests.

#### **IV. CONCLUSION**

Finding no error below, the judgment of the juvenile court is affirmed in all respects. The costs of appeal are assessed against Appellant, Father.

---

PATRICIA J. COTTRELL, JUDGE